

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

August 12, 2003

GSBCA 16110-RELO

In the Matter of GREGORY J. BIRD

Gregory J. Bird, Naples, Italy, Claimant.

Sharon Y. Alsop, Director, Human Resources Office, United States Naval Support Activity, Naples, Italy, appearing for Department of the Navy.

NEILL, Board Judge.

Claimant, Mr. Gregory J. Bird, is a civilian employee of the United States Navy. He disagrees with his agency's calculation of a portion of the foreign transfer allowance (FTA) to which the agency said he was entitled on the occasion of his transfer from Bath, Maine, to Naples, Italy. For the reasons explained below, we conclude that the agency's calculation is correct.

Background

The FTA is paid pursuant to implementing regulations issued by the Secretary of State and set out in the Department of State Standardized Regulations (DSSR). The DSSR define the FTA as:

an allowance under 5 U.S.C. 5924(2)(A) for extraordinary, necessary and reasonable expenses, not otherwise compensated for, incurred by an employee incident to establishing him or herself at any post of assignment in a foreign area, including costs incurred in the United States . . . prior to departure for such post.

DSSR § 241.1.a.

One of the components of the FTA is the "predeparture subsistence expense portion." This is applicable to lodging, meals (including tips), laundry, cleaning and pressing expenses incurred by an employee and each member of the employee's family while they are living in temporary quarters. Section 241.2.c of the DSSR expressly states that this portion of the allowance is available "for up to 10 days before final departure from a post in the United States to a post in a foreign area" The DSSR further provide: "The amount of

predeparture subsistence expense granted to an employee for expenses in departing a post in the United States for a post in a foreign area shall be determined according to the maximum per diem rate for the U.S. locality from which transferred" Id. § 242.3. Finally, the "ten days" referred to in the DSSR may be spent anywhere in the United States "as long as [the] employee or family members have not begun travel on orders and final departure is from the U.S. post of assignment." Id. § 242.3.c.

Claimant's problem in this case stems from the fact that, at the time of his transfer to Naples, he and his family did not live in the immediate vicinity of his permanent duty station (PDS) in Bath, Maine. Instead, their residence was located in Westbrook, Maine, a town near the city of Portland, Maine, and approximately forty miles or forty-five minutes by car from Bath. When Mr. Bird submitted his claim for FTA, he based his claim for the predeparture subsistence expense portion of the allowance upon the maximum per diem rate for the locality where his actual residence was located, i.e., Westbrook, rather than on the locality from which he was transferred, i.e., his PDS at Bath. The difference in the two per diem rates is significant. At the time of Mr. Bird's transfer, the per diem rate for Bath was \$95 while that for Westbrook was \$157.

Based upon the applicable provision of the DSSR, the agency insists that the predeparture subsistence portion of the FTA must be tied to the per diem rate in effect at Mr. Bird's duty station at Bath. Mr. Bird, instead, contends that the per diem rate in effect in the Westbrook area should be used.

Discussion

The DSSR provide no support for Mr. Bird's request that his agency tie the predeparture subsistence portion of his FTA to the per diem rate applicable to the area of his residence in Westbrook. As already noted, the DSSR expressly state that the per diem rate to be used shall be determined according to the maximum per diem rate for the U.S. locality from which the employee is transferred. The claimant's travel authorization indicates that he was transferred from Bath, Maine, to Naples, Italy. Although Westbrook may be within convenient commuting distance of the Mr. Bird's PDS at Bath, it can hardly be considered to be in the Bath locality. Indeed, the existence of a separate per diem rate for the Westbrook area only serves to confirm that Westbrook and Bath are not in the same locality.

Mr. Bird contends that he carefully reviewed the information on the FTA which was provided to him by his Human Resources Office. He further explains that he also reviewed information which he accessed on various Department of Defense (DoD) websites identified to him by the Human Resources Office as sources of guidance on permanent change of station benefits. Both Mr. Bird and his commanding officer contend that these various information sources are far from clear on whether the FTA is tied to the per diem rate for the transferred employee's PDS or his actual residence. The record contains some printouts and copies of guidance offered to DoD employees regarding the subsistence portion of the FTA. They confirm this alleged lack of clarity.

The agency suggests that the source of the claimant's confusion may lie in the fact that in calculating the subsistence expense portion of the FTA for a newly appointed employee

who is not transferred from a prior PDS, the applicable per diem rate is that which applies to the locality of the new employee's actual residence. According to the agency, therefore, the various references in some of its published guidance on the FTA to the use of *either* the actual residence per diem rate *or* the PDS per diem rate should not be understood as offering a choice of one or the other in calculating the subsistence portion of the FTA. Rather, the reference to the actual residence per diem rate should be understood as applicable only to a new appointee while reference to the PDS per diem should be understood as applicable to a transferred employee.

Given this explanation from the agency, we find the claimant's confusion readily understandable. Nevertheless, the unfortunate lack of clarity in DoD's guidance on this aspect of the FTA does nothing to change the plain meaning of the applicable guidance set out in the DSSR. It is, of course, to those regulations that we must look to settle this case. The President has delegated to the Secretary of State the authority to issue regulations which implement statutes providing for overseas pay differentials and allowances. Okyon Kim Ybarra, GSBCA 15407-RELO, 01-1 BCA ¶ 31,334. The FTA is clearly one of these allowances. Further, DoD's own travel regulation, the Joint Travel Regulations (JTR) (to which Mr. Bird is subject as a civilian employee of the Department) recognizes that, on matters regarding the FTA, it is the DSSR which control. JTR C1004; see generally Lena E. Hagedorn, GSBCA 15948-TRAV (Apr. 30, 2003).

The import of the applicable DSSR provision on the per diem rate to be used is only made clearer when one reads the related provision regarding where the ten days prior to departure may be spent. These days may be passed anywhere in the United States, provided the employee or family members have not begun travel on orders and final departure is from the employee's PDS. In other words, regardless of where the employee or his family may be during the final ten-day period, the intent of the regulation remains clear. The subsistence allowance portion of the FTA remains tied to the per diem rate of the locality of the employee's PDS.

Finally, we note that the definition of PDS in Appendix A of the JTR recognizes, in certain instances, that PDS can signify the employee's residence or other quarters from and to which the employee regularly commutes to and from work. Unfortunately for Mr. Bird, this provision is of no use to him in this particular situation. First, and most importantly, we find no similar provision in the DSSR, the controlling regulations, which might justify a broader reading of the corresponding term in that set of regulations, namely, "post of assignment." Secondly, the JTR definition itself applies this meaning to the term "PDS" only with respect to authorizations within the JTR relating to residence and household goods/personal effects. Consequently, it is not used even in the JTR in this broader sense with respect to authorizations dealing with the reimbursement of subsistence expenses.

The agency has acted correctly, therefore, in refusing to pay an FTA subsistence allowance in excess of the per diem rate in effect in the locality of Bath, Maine, at the time of Mr. Bird's transfer. The applicable DSSR provision effectively settles this matter regardless of any equitable considerations which might otherwise favor payment of his claim. The Government may not authorize the payment of money in violation of statute or regulation. Kevin S. Foster, GSBCA 13639-RELO, 97-1 BCA ¶ 28,688 (1996) (citing

Office of Personnel Management v. Richmond, 496 U.S. 414 (1990); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947)). Payment, in the absence of proper authorization, cannot be justified solely by the fact that a claimant may have relied in good faith and to his or her detriment on the incorrect advice of an agency official or publication. While it may seem grossly unfair that a claimant cannot be paid under these or similar circumstances, it must be recognized that the overriding concern in such cases is the protection of the taxpayers' interest in not having unlawful disbursements made from public funds. See Barry McGuire, GSBCA 15346-RELO, 01-1 BCA ¶ 31,343; Gary Macleay, GSBCA 15394-RELO, 01-1 BCA ¶ 31,210; Patricia A. Tobin, GSBCA 14483-RELO, 98-1 BCA ¶ 29,663.

Decision

Mr. Bird's claim is denied.

EDWIN B. NEILL
Board Judge